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Supreme Court, U.S.
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No. 03-1282

IN THE

Supreme Court of the United States

HEALTHPLAN SERVICES, INC., *et al.*,

Petitioners,

v.

MARY B. GUNNELLS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Fourth Circuit, by upholding the conditional certification of a class of negligence claims with a limited number of individual damages issues, properly applied Federal Rule of Civil Procedure 23 in light of *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999)?

2. Whether this case is an appropriate vehicle for addressing a split among two circuits when the outcome would be the same regardless of which approach ultimately is correct?

3. Whether, given the small number of circuit courts which have addressed the issue, the Court should allow the lower courts the opportunity to apply Rule 23 (c)(4)(A) under varying circumstances to help focus the issues presented by the alternative approaches?

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Respondents respectfully submit this Brief in Opposition to the Petition for Writ of Certiorari in No. 03-1282.

According to petitioner, this case presents a question of the proper application of Rule 23 of the Federal Rules of Civil Procedure. The Fourth Circuit, per Motz, J., properly applied Rule 23 and avoided conflict between the Opinion below and any other circuit courts. The Fourth Circuit correctly held that the district court did not abuse its discretion in conditionally certifying the class against petitioner.

There are three reasons that the Fourth Circuit's Opinion is not suitable for this Court's review:

First, the Opinion below faithfully followed *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999). The Court should deny certiorari because the Fourth Circuit's interpretation of Rule 23 is demonstrably correct and in harmony with this Court's precedent.

Second, the Opinion below does not hinge on an interpretation of Rule 23 which materially conflicts with the interpretation of another circuit. Thus, this case is an exceptionally poor vehicle for resolving the conflict between the Ninth and Fifth Circuits' approaches to Rule 23. The holding by the Fourth Circuit does not turn on the alleged conflict; with the fact in this case, the same result would have been reached under both the Fifth Circuit's and the Ninth Circuit's analysis. Therefore, this is not a proper case to resolve any material conflict between the Fifth Circuit and the Ninth Circuit.

Third, the Court should deny review because the conflict among the lower courts with respect to the issues presented would benefit immensely from additional steeping. For example, petitioner identifies only the Fifth Circuit and the Ninth Circuit (joined by two district courts) as having taken different views. Additional time will help distill the issues and put the Court in a better position to address the underdeveloped conflict.

STATEMENT OF THE CASE

This Petition involves an interlocutory appeal of the conditional certification of a class action against petitioner, Third Party Claims Management, Inc. ("TPCM"), for breach of contract and negligence which caused or contributed to the collapse of a healthcare plan known as the "Fidelity Plan" (the "Plan").

TPCM contracted with the Plan to process medical claims. *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 422 (4th Cir. 2003). The limited discovery completed reveals that TPCM failed to hire enough staff to timely process claims, did not have adequately trained employees, improperly lost and/or discarded claims, and generally breached its obligations. *Id.* "In May 1997, Fidelity *fired*[1]

1. TPCM's assertion that the contract "ended" is inaccurate. Pet. at 5. TPCM misstates the facts when it asserts that after the contract "ended" that the Plan continued to operate "*for the next several years*." *Id.* (emphasis added). The original complaint was filed approximately twelve months after TPCM last processed claims related to the Plan. TPCM also falsely implies that it was not until after TPCM was fired that claims went unpaid. *Id.* TPCM was identified in discovery and was added when the complaint was amended. TPCM greatly overstates the lapse of time between its negligence and the problems experienced by the class.

TPCM for incompetence" because of the huge backlog of claims created by TPCM's failure to live up to its contract. *Id.* (emphasis added). After being fired, TPCM continued to be paid for processing claims and gathering together data to transfer to the new claims administrator. However, TPCM failed to transfer complete claims information in a timely manner to the new claims administrator. The suit giving rise to this appeal was filed in August 1998.[2] The U.S. Department of Labor shut the Plan down in January 1999.

"As to TPCM, [respondents] allege that [TPCM] mismanaged administration of the Plan, created a huge backlog of unpaid claims, did not timely transfer information, and made it impossible to forecast rate increases accurately, resulting in the Plan's collapse and failure to pay hundreds, if not thousands, of health care claims." *Gunnells*, 348 F.3d at 422. The Fourth Circuit correctly summarized the claims which were fleshed out during the limited discovery permitted: "that TPCM's mismanagement of claims contributed to the ultimate collapse of the Plan and so caused Plaintiffs' damage." *Id.* at 428. The Fourth Circuit recognized evidence in the record supporting Plaintiffs' allegations of negligence against TPCM.[3]

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2. Discovery has been limited to class certification issues. The district court conditionally certified only the negligence and contract claims against TPCM.

3. Both the majority and the dissent discussed the wealth of evidence in the record supporting negligence claims against TPCM. *E.g.*, *Id.* at 412-22; 454-55. For example, the dissent stated:

> There is evidence in the record to support allegations that TPCM did a poor job of paying claims, sometimes

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The class claims certified against TPCM involve:

> a single, straightforward cause of action consisting of three questions common to all Plaintiffs — whether "TPCM violated its duties . . . as third party administrator of the Plan," whether "such conduct was a cause of the Fidelity Plan's failure," and whether "that failure directly injured Plaintiffs and the absent class members." J.A. 1249. Neither of the first two questions require any individual inquiry, and the third question may require nothing

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> losing claims and other times adjusting or "adjudicating" claims that should not have been adjudicated. TPCM admits that it did not have a sufficient number of trained claims examiners to stay current with claims being filed, and, as a result, a backlog in claims processing developed that grew to six to eight months. Plan members began to complain widely of the delays in the processing of their claims.

Id. at 454. Petitioner argues that the Fourth Circuit's general references to "negligence" claims, rather than identifying a particular cause of action by name, is error. Pet. at 7; 9; 10; 12; 19. At this preliminary stage, Plaintiffs should not be penalized because the complaint has not been amended to clarify some negligence claims and breach of contract claims. Based upon the limited discovery allowed, the Fourth Circuit and the district court implicitly recognized that the broad causes of action alleged in the complaint will necessarily be narrowed and amended as discovery continues. The Fourth Circuit clearly certified the negligence claims and related contract claims. *E.g.*, *Gunnells*, 348 F.3d at 422 (describing causes of action alleged). To the extent necessary, the Complaint will be amended to reflect evidence gathered in discovery.

> more than a ministerial determination that can be made simply and quickly.

Id. at 445.[4]

Over two years ago, TPCM filed a lengthy Rule 23(f) petition, in excess of seventy pages, requesting the Fourth Circuit review the district court's decision to conditionally certify several classes. TPCM filed a two volume addendum consisting of thousands of pages of materials presented to the district court, including entire depositions. Additionally, several defendant agents who sold the Plan to members of the class filed a Rule 23(f) petition. Responses were filed with attachments. The panel held oral argument. The opinion and dissent span eighty-eight pages. The Fourth Circuit clearly addressed the weaknesses of TPCM's arguments raised in the Petition.

After reviewing the massive record, the Fourth Circuit concluded the class against TPCM "seems even better suited for class treatment than the diverse issues against many defendants involving the laws of a number of states that [the Fourth Circuit] certified in *Central Wesleyan*." 348 F.3d at 427 (citing *Central Wesleyan College v. W.R. Grace & Co.*,

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4. The district court and the Fourth Circuit recognized that the calculation of unpaid bills is a ministerial, formulaic task which requires reviewing the Plan and determining the amount to be paid. Nonetheless, without citation to the record below, petitioner identifies seven excuses for its conduct. The excuses are nothing more than unsupported argument. Pet. at 13. Assuming, *arguendo*, that the excuses were fact, the damages calculations will still be made by a single expert witness. In fact, if the class is decertified, the same expert must appear in every case to explain the identical damages calculation methodology.

6 F.3d 177 (4th Cir. 1993)). The district court and the Fourth Circuit recognized that the unpaid medical claims are readily calculable through use of the computerized claims processing methods and formulas used by the Plan, that punitive damages would be calculated based on TPCM's conduct, and that only limited areas of individualized inquiry may be necessary. *E.g., id.* at 429.[5] In considering the requirements of Rule 23, the Fourth Circuit found the common issues in the only viable claims against TPCM predominated over the limited potential issues requiring individual analysis. *Id.* at 429-30.[6] According to the Fourth Circuit, "*Central Wesleyan* virtually compels the conclusion that the district court did not abuse its discretion in conditionally certifying Plaintiffs' class against TPCM." *Id.* at 446.

After a request by TPCM, rehearing and rehearing *en banc* were denied.

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5. The district court recognized the obvious when it comes to calculating compensatory damages in the form of unpaid claims: the calculation of medical bills to be paid under the Plan is a formulaic process, based on few variables. A single expert will be able to calculate what should have been paid under the Plan. The district court also noted that the court-appointed independent fiduciary already undertook this task using the Plan's parameters. *Gunnells*, 348 F.3d at 429. TPCM claims that "at least 1,400 mini trials must occur." Pet. at 13. While 1,400 such claims possibly *may* occur, it is unlikely as no individual case presented in South Carolina involving the Plan has presented such claims for damage to credit. The possibility that mini trials may occur does not diminish the huge benefit of handling the liability issues in a single trial, thereby avoiding the need for numerous juries to hear the same, repetitive testimony.

6. The version of Rule 23 contained in the Appendix (pages 177a to 187a) to the Petition is not the version which was considered below.

REASONS FOR DENYING THE PETITION

A. The Fourth Circuit Carefully Considered *Amchem* And *Ortiz* And Properly Upheld Class Certification.

The Court should deny the Petition because the Fourth Circuit correctly applied Rule 23 to the circumstances of this case to uphold the district court's certification of the class. TPCM fails to identify a material conflict between the Opinion below and *Amchem*. The Fourth Circuit respected all parts of Rule 23 and does not, contrary to petitioner's allegations, render any part of the rule superfluous.[7] Rather, it is the position advanced by petitioner which would create a conflict with this Court's opinions in *Amchem* and *Ortiz*.

The Fourth Circuit clearly considered and respected the Court's guidance as set forth in *Amchem* and *Ortiz*.[8] The Fourth Circuit devoted many pages of analysis to *Amchem*, *Ortiz*, and their progeny.[9] Contrary to petitioner's

7. The Federal Rules of Civil Procedure were adopted by order of the Court in 1937. Although Congress delegated this authority to the Supreme Court through the Rules Enabling Act of 1934, the content of the Rules was formed entirely by the Court. Wright & Miller, FEDERAL PRACTICE AND PROCEDURE: Civil 4th ed. § 1001. Thus, petitioner's concerns about whether the Opinion below "wholly discarded" the direction of the United States Congress, Pet. at 2, or "circumvented Congressional intent." Pet. at 3, are unfounded.

8. As *Amchem* does not even mention Rule 23(c)(4), it is unclear what conflict petitioner alleges exists between the Fourth Circuit opinion and *Amchem*. Significantly, TPCM fails to explain how the Fourth Circuit's discussion of *Ortiz*, a more recent case interpreting *Amchem* and discussing Rule 23(c)(4), is not persuasive.

9. For example, the Fourth Circuit acknowledged that under *Amchem*, settlement is relevant and must, therefore, affect the

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argument, nothing in the Fourth Circuit's Opinion would permit a court to certify any issue under the rubric of Rule 23(c) for class treatment without conducting a predominance inquiry. Pet. at 3.

After thoughtfully reviewing the district court's Rule 23 analysis, the Fourth Circuit found that "[s]uch care [by the district court] reflects assiduous respect for Rule 23's requirements, not an abuse of discretion." *Gunnells*, 348 F.3d at 430. It is the position adopted by petitioner which runs afoul of the Court's interpretation of Rule 23(c)(4) as set forth in *Ortiz*. *See Gunnells*, 348 F.3d at 440-41 (stating that the dissent's position "fails to take into account the Supreme Court's own characterization and application of *Amchem* in *Ortiz*.").[10] Surprisingly, even after failing to obtain rehearing, petitioner does not address *Ortiz*.

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predominance inquiry because manageability concerns are reduced in a settlement context. Based on this undeniable point, TPCM inexplicacably argues that the Fourth Circuit "relied on *Amchem* for the direct proposition that was rejected in *Amchem*". Pet. at 15.

10. The Fourth Circuit correctly described the subsections of Rule 23 as "interactive." The Fourth Circuit also recognized what petitioner fails to see: the facts in *Amchem* are vastly different than in this case. In *Amchem*, the common facts were that the "class members' share exposure to asbestos" which did not meet the predominance requirement given the different types of products, which release differing amounts of asbestos, caused different diseases, the different exposures (products, duration, and conditions), and other factors. *Ortiz*, 527 U.S. at 832 n.12. In this case, the class members (all from South Carolina) were covered by the same Plan, have the same type of injury (unpaid bills) caused by the failure of the Plan, and the class members' injuries were caused by the same negligence of the petitioner.

As the Fourth Circuit points out, the Court made clear that Rule 23(c)(4) should be used to allow class treatment of particular claims in order to accomplish the laudable goals of Rule 23. *Gunnells*, 348 F.3d at 440 (citing *Ortiz*, 527 U.S. at 856). The Fourth Circuit's position is supported by the plain text of Rule 23(c)(4), which provides that the district court may separate specific claims and then perform its analysis under Rule 23(a) and (b).[11] Further, the Advisory Committee's note on Rule 23(c)(4) explains:

> This provision recognizes that an action may be maintained as a class for particular issues only.

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11. The Fourth Circuit aptly described the problems with the argument made by the dissent and adopted by TPCM:

> First, the dissent's rigidly sequential approach ignores the plain language of the rule. Rule 23(c)(4) provides that:
>
> > *[w]hen appropriate (A) an action may be brought or maintained as a class action with respect to particular issues*, or (B) a class may be divided into subclasses and each subclass treated as a class, *and the provisions of this rule shall then be* construed and *applied* accordingly.
>
> Fed. R. Civ. P. 23(c)(4) (emphasis added). Thus, Rule 23 specifically dictates that "[w]hen appropriate" a class action may be "maintained" as to "particular issues" and, *after* that is done, "the provisions of this rule," such as the predominance requirement of (b)(3), "shall *then* . . . be construed and applied." *Id.* (emphasis added). The dissent's approach — that a court first determine "that the *action* as [a] whole satisfies the predominance

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> For example, in a fraud or similar case, the action may maintain its "class" character only through the adjudication of liability to the class; the members of the class may thereafter be required to come in individually and prove the amounts of their respective claims.

This case is just like the fraud example approved by the Advisory Committee: the district court certified the only claims in the underlying complaint which apply to TPCM – the negligence claims – while recognizing that a small portion of the damages issues *might* require individual inquiry.[12]

In analyzing the district court's opinion, the Fourth Circuit reviewed the Rule 23(a) prerequisites and found the single certified class satisfied the numerosity, commonality, typicality, and adequacy requirements. *Gunnells*, 348 F.3d at 425. Next, the Fourth Circuit correctly reviewed the certification order, pursuant to Rule 23(b)(3), to determine

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> and superiority requirements imposed by 23(b)(3)" and only then employ subsection 23(c)(4), [*Gunnells*, 348 F.3d at 453], simply ignores Rule 23(c)(4)'s express command.

Gunnells, 348 F.3d at 439.

12. This interlocutory appeal was accepted by the Fourth Circuit before merits discovery occurred. However, based on the limited class-related discovery, Plaintiffs recognized that only limited causes of action were appropriate against TPCM and "made abundantly clear" that they do not seek certification on any "direct" liability claims for failure to adjudicate any particular medical claims. *Id.* at 431. Respondents, to the extent necessary, expect to amend their complaint against TPCM after merits discovery on remand.

whether the common issues of law or fact predominated over necessary individual inquiry such that a class action would be superior to individual actions. *Id.* at 425-33. The Fourth Circuit stated:

> [T]he district court carefully considered the requirements of Rule 23(a) and (b)(3) and made specific and detailed findings as to compliance with those requirements. In doing so, the court followed the admonition in *A. H. Robins*, 880 F.2d at 740, to "take full advantage of the provision in [Rule 23(c)(4)] permitting class treatment of separate issues . . . to reduce the range of disputed issues" in complex litigation, and most especially the teachings of *Central Wesleyan* itself, and then exercised its discretion to grant conditional class certification.

Id. at 426.

The Fourth Circuit recognized that class treatment of the claim against TPCM served the purposes behind Rule 23. Class treatment would provide access to the courts for those claims that would be "uneconomical if brought in an individual action" and would reduce litigation costs by avoiding "enormous redundancy of effort, including duplicative discovery, testimony by the same witnesses in potentially hundreds of actions, and re-litigation of many similar, and even identical, legal issues." *Id.* at 426. The common and identical issues are the majority of the proof in all class members' claims. Class treatment also conserves important judicial resources by reducing the number of trials and the total amount of court time devoted to resolving the claims. *Id.* at 426-27.

The Fourth Circuit properly applied Rule 23(c) in light of *Ortiz*, parsing out the negligence-based claims for analysis under Rule 23(a) and (b). Applying common sense to the rule and the facts, the Fourth Circuit found that the district court had not abused its discretion in conditionally certifying the class.[13]

While petitioner champions the position that the Fourth Circuit analyzed only the limited discrete *issues* certified to see if it met Rule 23's requirements, it is clear that the majority considered the "*claims* against TPCM *as a whole*." *Id.* at 429 (first emphasis added). The Fourth Circuit reviewed the district court's order and concluded that the class against TPCM "seems even better suited for class treatment than the diverse issues against many defendants involving the laws of a number of states that [the Court] certified in *Central Wesleyan*." *Id.* at 427 (citing *Central Wesleyan College v. W.R. Grace & Co.*, 6 F.3d 177 (4th Cir. 1993)).[14] The Court should deny certiorari because the

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13. Using the same analysis, the Fourth Circuit also reversed the district court's certification of several agent subclasses, clearly vitiating the dissent's claim that the majority opinion would allow courts to look at common issues through a "pinhole" and ignore all other issues. *Gunnells*, 348 F.3d at 451.

14. TPCM raises several issues to support its argument that "the decision below is incorrect." Pet. at 23-26. TPCM's claim that the class will require 1,400 trials involving liability, comparative fault and damages is wrong.

While a subset of the class may wish to present individual damage issues, TPCM's comparative fault argument evidences a clear misunderstanding of the claims against TPCM. TPCM is liable for its own breaches of duty; TPCM cites no evidence which supports a

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Fourth Circuit's opinion properly interpreted Rule 23(c)(4)(A) in light of *Amchem* and *Ortiz*.

B. This Case Is Not A Good Vehicle For Resolving The Alleged Split Between The Fifth And Ninth Circuit Because The Opinion Below Does Not Turn On A Disputed Interpretation Of Rule 23(c)(4)(A).

While there is undeniably a split amongst the Fifth and Ninth Circuits on how to apply Rule 23(b)(3) in the case of a limited issues class under Rule 23(c)(4)(A), this case is a poor choice to address the split because the outcome would be the same under either approach. TPCM's claim that the Fourth Circuit's Opinion conflicts with *Castano v. Am. Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996) and other Fifth Circuit precedent is "confounding," to say the least, because those cases support the Fourth Circuit's opinion. *Gunnells*, 348 F.3d at 444. The Fourth Circuit explained that:

> the Fifth Circuit cases [cited by TPCM and the dissent] do not state, let alone hold, as the dissent would, that "the entire action," or "the action as a whole" — *i.e.*, all causes of action against all parties — must satisfy Rule 23(b)(3)'s

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finding that any class member was comparatively negligent. Respondents have made clear they are not claiming that TPCM improperly decided a particular claim. *Gunnells*, 348 F.3d at 431. Rather, respondents' claim is that TPCM's systematic failure caused the collapse of the Plan. The "comparative fault" issues raised by TPCM would only come into play if respondents were making direct claims. Pet. at 13.

The Fourth Circuit thoroughly addressed the superiority and manageability issues. *See e.g., Gunnells*, 348 F.3d at 426-27. The Fourth Circuit's decision is correct.

> predominance requirement before a court can employ Rule 23(c)(4) to certify a class. Rather, the Fifth Circuit cases merely require that "*a cause of action, as a whole,* must satisfy rule 23(b)(3)'s predominance requirement" before "rule 23(c)(4) is available."

Id. (citing *Smith v. Texaco, Inc.* 263 F. 3d 394, 409 (5th Cir. 2001), dismissed *sub nom* pursuant to settlement after court had requested response to petition for rehearing *en banc*, 281 F.3d 477 (5th Cir. 2002)); *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 421-22 (5th Cir. 1998); and *Castano*, 84 F.3d at 745 n.21. TPCM's proposed interpretation of *Castano* and its progeny is inconsistent with the Fifth Circuit's own analysis; there is no conflict between the Fourth Circuit's opinion and Fifth Circuit precedent. The Fourth Circuit, like the Fifth Circuit in *Allison,* looked at the claims as a whole.[15]

Furthermore, as the Fourth Circuit explained, it saw no reason to enter the "fray"[16] between the Fifth Circuit and the Ninth Circuit, because:

> Plaintiffs' *cause of action* as a whole against TPCM satisfies the predominance requirements

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15. Petitioner argues that the Ninth Circuit takes a "liberal" approach to class certification. Pet. at 19. This argument is apparently raised because the Ninth Circuit was unwilling to "close the door on class action litigation in products liability cases." *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1233 (9th Cir. 1996). While it is debatable that the Ninth Circuit's approach is "liberal," it is clear that the Fourth Circuit did not take a liberal approach. In fact, the Fourth Circuit took a similar approach to that of the *Allison* court. *Gunnells*, 348 F.3d at 442 (finding that *Allison* analyzed the cause of action as a whole).

16. As the Fourth Circuit explained, a split of the circuits already exists as to how Rule 23(c)(4) should be interpreted. The Ninth Circuit (Cont'd)

> of Rule 23. Thus even if the view adopted by the Fifth Circuit (that predominance must be established within a given cause of action to invoke (c)(4)) rather than that of the Ninth Circuit (that this is not necessarily required) constituted the law of this circuit, our holding here would be in full accordance with the Fifth Circuit view.

Gunnells, 348 F.3d at 444-45. Thus, having looked at all the evidence in the record below, the Fourth Circuit found that the outcome would be the same under either circuit's approach.

The position advocated by petitioner is not supported by the text of Rule 23 and this Court's guidance in *Amchem* and *Ortiz*. Indeed, all reported cases found discussing Rule 23(c)(4) rejected the interpretation TPCM urges the Court

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has adopted the more flexible approach set forth in *Valentino*, 97 F.3d at 1234, while the Fifth Circuit has adopted a more strict application of Rule 23 (c)(4). *E.g.*, *Allison*, 151 F. 3d at 421.

TPCM also suggests a circuit split exists about how Rule 23(c)(4) can be squared with the Seventh Amendment, arguing that the Ninth Circuit "expressly disavowed" the position taken by the Fifth Circuit. Pet. at 21. However, careful review of the *Valentino* decision reveals that the Ninth Circuit merely did "not accept" the position adopted by the Seventh Circuit in *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995) because the Constitutional concern "may" not be in line with Ninth Circuit precedent and was "never squarely presented to the district court." *Valentino*, 97 F.3d at 1232. Similarly, the Seventh Amendment concern raised here was not squarely presented in this Court, in the Fourth Circuit, or in the district court.

to consider.[17] To avoid a circuit conflict, the Court should deny the Petition for Writ of Certiorari.

Even if the Court were to find that the Fourth Circuit should have applied the Fifth Circuit's approach, the correct result would have been the same. Here the differing approaches to Rule 23(c)(4)(A) would yield the identical conclusion. Certiorari should be denied because this case does not provide a means of exposing the disadvantages of the conflicting approaches to Rule 23.

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17. Neither the Fourth Circuit nor Plaintiffs' counsel is aware of any "decision by any court that has adopted the view that in . . . cases . . . involving more than one cause of action [that] a court must evaluate predominance in the context of the 'action taken as a whole' or the 'case as a whole.'" *Gunnells*, 348 F.3d at 445 (internal citations omitted). Even those cases cited by TPCM support the majority opinion. It is TPCM's position which conflicts with the other courts which considered this issue. The following cases contradict the interpretation of Rule 23(c)(4) espoused by TPCM here: *Smilow v. Southwestern Bell Mobile Sys., Inc.*, 323 F.3d 32, 38-43 (1st Cir. 2003); *Piazza v. EBSCO Industries, Inc.*, 273 F.3d 1341, 1349, 1351-53 (11th Cir. 2001); *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 154 (2d Cir. 2001); *Becherer v. Merrill Lynch*, 193 F.3d 415, 430 (6th Cir. 1999) (*en banc*) (Moore, J., concurring in the judgment); *Allison*, 151 F.3d at 421-22; *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 453 (3d Cir. 1977); *Geraghty v. United States Parole Comm'n*, 579 F.2d 238, 252-53 (3d Cir. 1978), *vacated on other grounds*, 445 U.S. 388, 402-03 (1980); *Cannon v. Cherry Hill Toyota, Inc.*, 184 F.R.D. 540, 544 (D. N.J. 1999); *Stephenson v. Bell Atl. Corp.*, 177 F.R.D. 279, 289 & n.4, 295 (D. N.J. 1997); *Hudson v. Capital Mgmt. Int'l, Inc.*, 565 F. Supp. 615, 630-31 (N.D. Cal. 1983); *Lewis v. Capital Mortgage Invs.*, 78 F.R.D. 295, 307 (D. Md. 1978); *Hernandez v. Motor Vessel Skyward*, 61 F.R.D. 558, 561 (S.D. Fl. 1973).

C. The Issues Raised By the Split Between the Fifth and Ninth Circuit Should Steep Further in the Lower Courts.

The split between the Fifth Circuit and the Ninth Circuit on how to approach the interplay between Rule 23(b)(3) and Rule 23(c)(4)(A) has received little attention in the lower courts. Petitioner argues that the split is recurring and needs this Court's immediate attention. Pet. at 19. However, careful consideration of the cases cited to the Court reveals that only the Fifth and Ninth Circuits (followed by two district courts, *Emig v. Am. Tobacco. Co.*, 184 F.R.D. 379 (D. Kan. 1998) and *In re Tetracycline Cases*, 107 F.R.D. 719 (W.D. Mo. 1985)) have reached the issue. Pet. at 20.

Petitioner erroneously cites a third district court, *Rink v. Cheminova, Inc.*, 203 F.R.D. 648 (D. Fla. 2001), as having taken a different approach. *Id.* However, like the Fourth Circuit below, the *Rink* court found "it unnecessary to render an opinion or recommendation on which is the correct view of the proper interplay between these provisions of the rule." *Id.* at 670 (noting that the court tended to agree with the Ninth Circuit's approach).

Additional time to allow the application of Rule 23(c)(4)(A) to new fact patterns will help distill the issues and put the Court in a better position to address how to resolve the underdeveloped conflict. Certiorari should be denied.

CONCLUSION

The Petition for a Writ of Certiorari should be denied. The Fourth Circuit analyzed the facts, Rule 23 and the case law and correctly concluded that the district court did not abuse its discretion in conditionally certifying a class against TPCM. The Opinion below is well reasoned and follows this Court's law.

Respectfully submitted,

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